

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 13, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1660

Cir. Ct. No. 2010CV13302

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. GERALD PORTER,

PETITIONER-APPELLANT,

V.

**MICHAEL COCKROFT, SUPERINTENDENT, FELMERS O. CHANEY
CORRECTIONAL CENTER,**

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
DANIEL A. NOONAN, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Gerald Porter appeals an order denying his petition for writ of *habeas corpus*. The circuit court's written decision properly analyzes and disposes of the issues raised by Porter's petition. Therefore, we affirm for the reasons explained in the circuit court's decision. See WIS. CT. APP. IOP VI (5)(a)

(Nov. 30, 2009) (“When the trial court’s decision was based upon a written opinion ... the panel may ... make reference thereto, and affirm on the basis of that opinion.”). A copy of the circuit court’s decision is attached to this per curiam and incorporated by reference.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

STATE OF WISCONSIN,
ex. rel. GERALD PORTER,

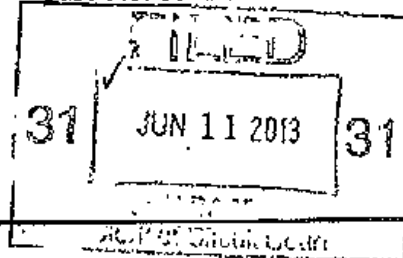
Petitioner,

v.

MICHAEL COCKROFT,
Superintendent, Felmers O. Chaney Correctional Center,

Respondent.

Case No. 10-CV-13302



DECISION AND ORDER

Petitioner, Gerald Porter, filed this petition for writ of habeas corpus on August 11, 2010, at which time he was being held by the Respondent, Michael Cockroft, at Felmers O. Chaney Correctional Center. Petitioner has since been released on extended supervision/parole and is no longer incarcerated at Felmers O. Chaney Correctional Center.

The underlying facts of this case start on May 19, 1999 when Petitioner was sentenced to five years in prison for possession of cocaine with intent to distribute (the 1999 case). Petitioner was released on parole on November 21, 2000, with a scheduled discharge-date of September 6, 2004. However, Petitioner was arrested on September 4, 2004 and a hold was placed on his supervision for the 1999 case. The September 4th arrest led to a charge in Milwaukee County Case No. 04-CF-5027 (the 2004 case).

On February 11, 2005, the DOC revoked Petitioner's parole in the 1999 case and he was re-confined to prison for one year and six months, with 180 days of credit towards that time. Porter was once again awarded parole for the 1999 case on February 17, 2006, the mandatory release date for the 1999 case. Petitioner was required to serve two years and 18 days on parole.

However, on February 10, 2006, one week prior to the mandatory release date on the 1999 case, Petitioner was found guilty by a jury in the 2004 case. On June 8, 2006, Petitioner was sentenced to 21 years of prison, broken down into 11 years of confinement followed by 10 years of extended supervision, with 113 days of credit (going back to 2/17/06, the mandatory

release date on the 1999 case). This sentence was to run consecutive to his 1999 case. Petitioner appealed the conviction in the 2004 case. While his appeal was pending, Petitioner began serving the 2004 sentence.

On March 10, 2008, the DOC issued Petitioner a discharge certificate on the 1999 case, effective March 2, 2008. The DOC asserts that the discharge certificate was issued erroneously because of a computer system glitch that did not recognize the sentence in the 2004 case.

On October 30, 2008, Petitioner was granted a new trial on the 2004 case and the previous judgment of conviction from the 2004 case was vacated. The 2004 case was scheduled for a new trial and the court set bail. However, Petitioner was unable to post during the entire length of the proceedings.

On October 9, 2009, prior to the new trial, Petitioner entered an Alford plea to amended charges in the 2004 case. He was sentenced to prison for seven years to run consecutive to any other sentence, broken down into five years of initial confinement followed by two years of extended supervision. Petitioner also received 1330 days of sentence credit (going back to 2/17/06, the mandatory release date on the 1999 case).

In November 2009, the DOC realized that Petitioner was given an improper discharge certificate on the 1999 case back in March of 2008. Therefore, the DOC ordered the March 2008 discharge certificate be destroyed and an amended discharge date be calculated. After making the new calculation, the DOC determined that Petitioner's extended supervision time/parole time was to start January 29, 2011 with the maximum discharge date to be February 17, 2015. Petitioner was released to supervision in January 2011 and continues to be supervised by the DOC in the community.

Petitioner has filed the present petition for habeas corpus, arguing that the DOC is improperly restraining his liberty because when the discharge certificate was issued on March 10, 2008, the DOC lost jurisdiction over Porter as to the 1999 case. Therefore, Petitioner asserts that he already served two years and 18 days on parole for the 1999 case (from 2/17/06 to 3/2/08). Thus, his discharge date for the 2004 case must be recalculated to January 30, 2013.

WRIT OF HABEAS CORPUS STANDARD

"Writ of habeas corpus is an equitable remedy that protects a person's right to personal liberty by freeing him or her from illegal confinement." State ex rel. Washington v. State, 2012

WI 74, ¶ 18, 343 Wis. 2d 434, 819 N.W.2d 305. However, habeas corpus is an extraordinary writ that is only available to a petitioner under very limited circumstances. State ex rel. L'Minggio v. Gamble, 2003 WI 82, ¶ 18, 263 Wis. 2d 55, 667 N.W.2d 1. A petitioner who seeks habeas corpus relief is required to meet three criteria: (1) a petitioner must be restrained of his or her liberty; (2) a petitioner must show that the restraint was imposed by a tribunal without jurisdiction or that the restraint was imposed contrary to constitutional protections; and (3) a petitioner must demonstrate that there was no other adequate remedy available in the law. Id.

ANALYSIS

The discharge certificate was a nullity

There is no dispute that the March 10, 2008 discharge certificate for the 1999 case was erroneous because at the time it was issued Petitioner was then serving two consecutive sentences. The DOC is required to issue a discharge certificate "at the expiration of the term noted on the court order committing the client to the custody and supervision of the department." Wis. Admin. Code § 328.17(2). When an individual is serving consecutive sentences, this means at the expiration of the offender's entire aggregated consecutive sentence. In the present case, when the DOC issued the discharge certificate on March 10, 2008, Petitioner had not served the entire term of his sentence. He was still serving the sentence for the 2004 conviction. Thus, the discharge certificate was issued in violation of the governing statute and administrative code.

Although the discharge certificate was erroneous when it was granted in March 2008, Petitioner argues that the DOC should be bound by that discharge for two reasons: 1) Equity requires that the DOC be bound by the discharge certificate; and 2) the DOC was required to issue a discharge certificate on October 30, 2008, when Petitioner's 2004 conviction was overturned. However, both arguments are unpersuasive.

I. Equity does not require the DOC be bound to the erroneous discharge certificate

Petitioner argues that it is too late for the DOC to rescind the discharge certificate. Petitioner asserts that it is poor public policy to tell a defendant almost two years after a certificate of discharge is issued that it is invalid. Therefore, Petitioner argues equity requires

that this Court grant the writ of habeas corpus. However, other Wisconsin courts have already heard and rejected the exact argument Petitioner raises.

Although the DOC failed to correct the issue of the erroneous discharge certificate for almost two years, Wisconsin case law makes it clear that the DOC is permitted to rescind an erroneously issued discharge certificate. See State ex rel. Greer v. Schwarz, 2012 WI App 122, 344 Wis. 2d 639, 825 N.W.2d 497. In Greer, the defendant was convicted of two felonies. Id. at ¶ 2. He was sentenced to a term of confinement on one of the convictions and probation on the other to run consecutively. Id. After completing his sentence for the first felony, the DOC improperly issued the defendant a discharge certificate. Id. at ¶ 3. The discharge certificate was erroneous because the defendant still had to complete his probation sentence. Id. About three years after DOC issued the discharge certificate, the defendant was involved in a new felony conviction. Id. at ¶ 4. When conducting a presentence investigation related to the defendant's new conviction, the DOC discovered defendant's consecutive probation term related to his previous sentencing. Id. Thus, the DOC took the defendant into custody on a probation hold and initiated revocation proceedings. Id.

The Defendant argued that the DOC could not revoke his probation because he had previously been issued a discharge certificate. Id. at ¶ 9. Although the discharge certificate was improperly issued, the defendant asserted the DOC was now bound by the document. Id. However, the Court of Appeals disagreed and held that discharge certificate did not have "the effect of discharging [the defendant] from that probation term because that three-year period of probation ordered by the court had not expired at the time the certificate was issued, as required by the cited statute and administrative code." Id. at ¶ 10. Thus, the discharge certificate could not be interpreted as discharging the defendant from the term of probation ordered by the court. Id.

The facts of the present case are similar to the facts in Greer. Although the DOC issued a discharge certificate releasing its jurisdiction over Petitioner, that discharge certificate was issued erroneously. As outlined in Greer, the DOC does not lose jurisdiction over an individual when it issues an erroneous discharge certificate. Instead, the DOC loses jurisdiction over an individual "at the expiration of the term noted on the court order committing the client to the custody and supervision of the department." Petitioner had not completed his sentence when the discharge certificate was issued, thus, the discharge certificate did not discharge Petitioner from the term of

parole. Like the DOC in Greer, the DOC in the present case did not lose jurisdiction over the Petitioner. Therefore, the DOC could rescind the erroneously issued discharge certificate and recalculate the correct discharge date.

II. The vacated conviction for the 2004 case does not change Petitioner's discharge date

Petitioner argues that when his conviction on the 2004 case was vacated on October 30, 2008, Petitioner was no longer serving any sentences. Therefore, Petitioner asserts that either 1) the discharge certificate issued on March 10, 2008 was valid as of October 30, 2008; or 2) the DOC was required to issue a valid discharge certificate, dating back to March 2, 2008. However, Petitioner's arguments are not persuasive.

Petitioner's argument rests on the assumption that as of October 30, 2008 Petitioner had completed the two years and 18 days on parole for the 1999 case. However, this assumption is incorrect. Petitioner's initial sentence for the 2004 case was to be served consecutive to his 1999 case. Thus, Petitioner's confinement portion of his 1999 case was to run consecutive with the confinement portion of his 2004 case and the parole portion of Petitioner's 1999 case was to run consecutive to the term of extended supervision in his 2004 case. See Wis. Stat. § 973.15; and State ex rel. Thomas v. Schwarz, 2007 WI 57, 300 Wis. 2d 381, 732 N.W.2d 1. In other words, Petitioner could not start serving the parole portion of his 1999 sentence until he completed the confinement portion of both his 1999 and 2004 cases. Given that Petitioner was incarcerated from February 17, 2006 through October 30, 2008 for the 2004 case, he could not have served the parole portion of his 1999 case.

The fact the 2004 conviction was vacated on October 30, 2008 does not change the fact that Petitioner had not yet served the parole portion of his 1999 case. This conclusion is demonstrated by the fact that in connection with the new sentence in the 2004 case based on Petitioner's Alford plea, Petitioner received 1330 days of sentence credit. This put the new sentence start date at February 17, 2006, which was the mandatory release date on the 1999 case. Since Petitioner received sentence credit for February 17, 2006 to March 2, 2008, he was in custody for purposes of the 2004 case at that time and not on parole for the 1999 case.

Since Petitioner has never "served" the parole portion of the 1999 case, the DOC was not required to issue a discharge certificate. Furthermore, an existing sentence was being served at

the time the new sentence for the 2004 case was ordered. Therefore, it is proper for the new sentence for the 2004 case to run consecutive to the 1999 case. Petitioner must serve the confinement portion of the 2004 case before starting to serve the parole portion of the 1999 case, making the correct maximum discharge date February 17, 2015 for Petitioner's extended supervision/parole time.

CONCLUSION

Based upon all of the files, records and proceedings had herein, the arguments of the parties as set forth in their briefs, and in light of the applicable standard of review this Court is bound to follow, this Court dismisses the habeas action and quashes the writ for the reasons outlined above.

SO ORDERED.

Dated this 11th day of June, 2013, at Milwaukee, Wisconsin.



BY THE COURT:

A handwritten signature in black ink, which appears to read "Daniel A. Noonan". The signature is written in a cursive, flowing style.

Honorable Daniel A. Noonan
Circuit Court Judge

THIS IS A FINAL ORDER OF THE COURT FOR THE PURPOSES OF APPEAL

